

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



February 5, 2004

Agenda ID #3236
Ratesetting

TO: PARTIES OF RECORD IN APPLICATION 02-07-050

This is the draft decision of Administrative Law Judge (ALJ) Malcolm. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:jva

Attachment

Decision **DRAFT DECISION OF ALJ MALCOLM** (Mailed 2/5/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SBC Pacific Bell Telephone Company (U 1001 C), a corporation, for Authority to Categorize Local DA Service as a Category III Service.

Application 02-07-050
(Filed July 31, 2002)

OPINION DISMISSING APPLICATION AND CLOSING PROCEEDING

I. Summary

This order grants Pacific Bell Telephone Company's (SBC California) motion to dismiss this application and closes the proceeding. This proceeding is closed with prejudice for a period of two years, during which time SBC California may not seek recategorization of its directory assistance (DA) services. It states our intent to use the record in this proceeding in any future application, should one be filed. Finally, it authorizes Greenlining Institute (Greenlining) and The Utility Reform Network (TURN) to seek intervenor compensation for their work in this case.

II. Background

On July 31, 2002, SBC California filed the above-entitled application (Application) seeking maximum pricing flexibility for its DA services as a "Category III" service. The Application stated that the market for local DA in California had become fully competitive, meeting the criteria for reduced

regulatory oversight. The Commission's Office of Ratepayer Advocates (ORA) and TURN protested the application.

On April 22, 2003, the then-assigned Administrative Law Judge (ALJ) published a proposed decision for comment that would have dismissed the Application without prejudice to permit the Commission to address higher priority proceedings. On August 1, 2003, Commissioner Susan P. Kennedy issued a proposed alternate decision that would have granted SBC California's request to pursue its Application. Prior to the Commission meeting on August 21, 2003, the Commission withdrew both proposed decisions from its meeting agenda. The Application has since proceeded as originally requested by SBC California. The Assigned Commissioner subsequently issued a scoping memo and ruling, identifying relevant issues on the basis of parties' written comments and the prehearing conference (PHC). The scoping memo scheduled evidentiary hearings and stated the Commission's intent to conduct public participation hearings (PPHs) in early 2004.

On November 14, 2003, SBC California tendered for filing a "Notice of Withdrawal of Application." Among other things, the pleading stated SBC California's view that "SBC California's application is not being and would not be evaluated solely based on the evidentiary record or Commission precedent." The pleading stated a general objection to elements of the scoping memo and the Commission's decision to hold PPHs.

On November 21, 2003, the assigned ALJ issued a ruling rejecting the filing of SBC California's November 14 pleading, finding the applicant does not have authority to withdraw its application and that the Commission has sole authority to dismiss or close a proceeding. The ruling suggested that SBC California could file a motion to withdraw the application. It directed SBC California to inform

the Commission as to the status of notice to customers of the PPHs, notice of which has been previously required by the assigned ALJ.

On November 25, 2003, SBC California delivered a letter to the Commission explaining that it had not taken any steps to notify its customers of the PPHs because it had decided not to pursue its application. On December 3, 2003, SBC California filed a motion to withdraw its application. The motion is silent as to the reasons for the proposed withdrawal of the application. ORA and TURN subsequently filed a response to the motion.

On December 5, 2003, the assigned ALJ issued a ruling suspending the schedule and discovery in this proceeding, but otherwise directing parties to conduct themselves in a manner that recognizes the proceeding is open and active until and unless the Commission closes it.

III. November 21, 2003 Notice of Withdrawal

We hereby affirm the ALJ's ruling which rejected the filing of SBC California's November 21 "Notice of Withdrawal of Application." Her ruling correctly finds that only the Commission has the authority to close or dismiss a contested proceeding. (Decision (D.) 92-04-027, D.03-07-032.)

Because the November 21, 2003 pleading was never filed in its original form, we do not address its allegations here in any depth. We affirm, however, that SBC California has not presented any evidence to suggest it cannot expect a decision based on the record evidence of the proceeding. SBC California has not on the record of this proceeding appealed any element of the scoping memo or objected to the Commission's decision to conduct PPHs. In fact, SBC's attorney stated that SBC would not oppose public participation hearings at the November 19, 2002 PHC (TR 39). The Commission is not bound by the policies or practices adopted by past decisions as long as it has provided notice and an

opportunity to be heard, consistent with Pub. Util. Code § 1708. Finally, the Supreme Court has found that the Commission must conduct its proceedings in ways that promote the interests of the public. (*California Motor Transport Company vs. California Railroad Commission*, 30 Cal2d 184.) Accordingly, an applicant seeking Commission action should expect to submit its proposal to public scrutiny and the procedures applied by the Commission on behalf of the public interest.

IV. Standard for Withdrawal of Applications

SBC California seeks the withdrawal of its application and, presumably, the closure of this proceeding. ORA, Greenlining and TURN (Consumer Groups) filed a joint response to SBC California's motion. SBC California subsequently replied to Consumer Groups' pleading.

Consumer Groups argue that SBC California cannot unilaterally withdraw its application on matters of public concern, particularly where the Commission and parties have invested substantial time and resources litigating the application. Consumer Groups state that SBC California's motion does not provide a rationale for terminating the proceeding. Consumer Groups observe that SBC California opposed the ALJ's proposal to close this proceeding on the basis that the parties had spent significant time in pursuit of resolving related issues, suggesting the Commission would shirk its regulatory responsibilities if it summarily closed the proceeding. Because the Commission decided to proceed with the application at SBC California's urging, Consumer Groups suggest SBC California reimburse the Commission for expenses incurred after the issuance of the scoping memo.

Consumer Groups suggest that the Commission prohibit SBC California from refiling a request that local DA be subject to Category III regulation within

five years after dismissal of this Application. Consumer Groups argue this condition of withdrawal would prevent SBC California from “forum shopping” or refiling when the circumstances are more favorable to it, and would deter future attempts to employ withdrawal as a strategy in other proceedings. Consumer Groups also suggest the Commission reaffirm the value of conducting PPHs on this issue and state that any future application regarding DA services will include such hearings.

SBC California responded to Consumer Groups’ comments. It states that the Commission has routinely permitted withdrawals of applications and has only denied such withdrawals where an applicant is motivated to avoid an adverse outcome after hearings. It states it is not motivated by such concerns and is not forum shopping. It objects to any limitations on its ability to seek recategorization of DA services in the future and to Consumer Groups’ recommendation that SBC California reimburse the Commission and parties for work in this proceeding.

Discussion

The Commission has sole authority to close a proceeding. An applicant’s motion to withdraw its application does not by itself, close a proceeding or change its status in any way. Although the Commission has usually granted such motions where they are justified, the Commission may deny motions to withdraw when doing so is in the public interest and pursue matters of public concern after an applicant has moved to withdraw an application. (D.89-09-025, D.01-02-017, D.01-02-040.) The Commission may impose conditions on future applications even after an application is withdrawn and a proceeding is closed. (D.01-02-040.) Notwithstanding a party’s wish to terminate its involvement in a Commission proceeding, the Commission expects the full cooperation of the

applicant and any other party. In these ways, the Commission is unlike a civil court overseeing a lawsuit between two parties and need not follow a civil court's procedures in the pursuit of its obligations to the broader public. Indeed, the California Supreme Court has found that the Commission has a duty to the public that transcends that of a civil court litigating the claims of specific parties.¹

SBC California alleges the Commission has developed a limited "standard" for denying motions to withdraw applications, namely, that an application may not be withdrawn for the purpose of avoiding an adverse outcome. The Commission articulated this justification for denying a motion to withdraw in D.92-04-027. The order, however, does not and could not limit the Commission's discretion to deny a motion for withdrawal on other grounds and does not even suggest that a proceeding closes automatically at the discretion of the applicant.

Even assuming D.92-04-027 were an appropriate standard for denying a motion to withdraw an application, SBC California has not demonstrated, or even alleged, that its withdrawal is motivated by something other than a fear that its application will be denied. To the contrary, its November 12 "Notice of Withdrawal" suggests SBC California may have been motivated by a concern that the Commission would not grant its application. However, it is a factual matter we nevertheless need not resolve here.

V. SBC California's Failure to Comply with the ALJ's Ruling Regarding Customer Notice for Hearings

On October 14, 2003, the ALJ assigned to this proceeding held a conference call with SBC California and other parties for the limited purpose of scheduling the PPHs anticipated by the scoping memo. During the conference call, SBC

¹ *Cal. Motor Transport Co. v. Railroad Comm.* (1947) 30 Cal. 2d 184.

California's attorney objected to the Commission's plan to conduct PPHs. The ALJ stated the assigned Commissioner intended to move ahead with PPHs, consistent with the scoping memo, and referred SBC California's attorney to his statement at the PHC that SBC California did not oppose PPHs. The ALJ informed SBC California's attorney that if SBC California sought a change to the scoping memo, the appropriate procedural course was for SBC California to file a motion. To date, SBC California has not filed a motion objecting to PPHs nor the issues identified in the scoping memo.

Subsequently, on November 7, 2003, the ALJ informed SBC California and the parties to this proceeding of the dates, times and locations for PPHs. SBC California had previously informed the ALJ that it needed the hearing information no later than November 10, 2003 in order to publish and mail notices to customers of the hearings. On November 25, 2003, and in response to an ALJ Ruling dated November 21, 2003, SBC California sent a letter to the Commission stating that it had not taken steps to notify customers of the PPHs, as required by the ALJ on November 7. SBC California's letter asserts that its decision not to notify its customers of the hearings "was entirely reasonable" given SBC California's "decision not to proceed with the Application." Prior to this communication ordered by the ALJ, SBC California did not seek permission to suspend its duty to notify customers of the hearings or even notify the Commission of its intent to suspend this duty.

Discussion

SBC California may not ignore a ruling or order of the Commission on the basis that it has an outstanding and unresolved motion before the Commission. SBC California violated an ALJ ruling when it failed to proceed to publish and mail notices to its customers regarding the PPHs. SBC California allowed the

final date to pass that would allow timely customer notification before even tendering its rejected notice of intent to withdraw. Its failure to publish and mail customer notices effectively made moot the Commission's decision to conduct such hearings because, absent adequate customer notice, the Commission would not expect customer attendance at the hearings. SBC California also violated the ruling of the Assigned Commissioner which stated the Commission's intent to conduct PPHs. If SBC California wished to suspend notice for the hearings while the Commission was considering its motion to withdraw, SBC California should have filed a timely motion to suspend the hearings and the customer notification process.

SBC California's failure to comply with an ALJ's ruling is subject to fines authorized by §§ 2107 and 2108 and is tantamount to a violation of a Commission order. The Commission delegates authority to ALJs to conduct Commission proceedings and to take all procedural steps necessary to assure the fair and efficient management of those proceedings. (Rule 63.) If the Commission were to permit a party to ignore the authority of the ALJ, the integrity of our proceedings would quickly deteriorate and our decision-making responsibilities would be hopelessly compromised.

Finally, Rule 1 of the Commission's Rules of Practice and Procedure require that any person authorized to represent a party in Commission proceedings "to maintain the respect due to the Commission, members of the Commission and Administrative Law Judges." SBC California demonstrated a lack of respect for the Commission, the Assigned Commissioner and the assigned ALJ in this proceeding when it ignored an ALJ's directive and the underlying authority for her directive, a scoping memo and ruling signed by the Assigned Commissioner. In so doing, SBC California violated Rule 1.

Section 2107 and Section 2108 authorize the Commission to fine an utility for its failure to comply with “any part of provision of any order, decision, decree, rule, direction, demand or requirement of the Commission...” We would be within our authority to fine SBC California for its failure to comply with the directive of the ALJ and the ruling of the assigned Commissioner. We decline to do so at this time but put SBC California on notice of its duty to comply with our directives at all times.

VI. PPHs

Consumer Groups recommend the Commission express its intent to conduct PPHs in the event SBC California refiles an application to recategorize its DA services. SBC California objects to this proposal.

The decision of the assigned Commissioner in this proceeding to conduct PPHs was a reasonable and logical response to the application and its potential impacts. The Commission has a duty to conduct its procedures in ways that are responsive to the public’s expressions of concern. In this case, the Commission has so far received more than 5,000 communications from consumers expressing concerns that SBC California’s proposal would result in higher rates.²

Moreover, it is reasonable for the Commission to provide a forum that would promote consideration of all potential outcomes of an application, not just those identified by the applicant. Although SBC California proposes the standard of review in this case should be limited to whether SBC California has market power, this standard of review could obscure the potential impacts of SBC California’s application. The application effectively asks the Commission to

² The last time SBC (then Pacific Bell) sought to increase its DA rates in 1998 (Application (A.) 98-05-038, D.99-11-051), the Commission received over 34,000 letters from members of the public, mostly in opposition to a rate increase.

permit SBC California to price its DA services with wide discretion. As the record reflects, the price of SBC California's DA services in other states is substantially higher than in California, where DA prices are capped. PPHs would provide members of the public a forum to address this issue.

We decline to commit a future Commission to PPHs because future Commissions must have discretion to design procedures that are responsive to the issues and public concerns before them. We nevertheless state our support for the assigned Commissioner's decision to hold PPHs in this case.

VII. SBC California's Failure to Respond to Discovery Requests

Consumer Groups allege that SBC California has resisted responding to previous data requests and, following service of its motion, refused to provide responses to any data requests. SBC California did not deny this allegation in any pleading.

SBC California's refusal to cooperate with parties on matters of discovery was improper. The scoping memo issued in this proceeding and Commission practice presumes that parties will act in good faith during the discovery process. The appropriate course of action for SBC California, if it objected to a discovery request would have been to meet and confer and to raise the issue with the assigned ALJ. As discussed previously, only the Commission may determine the procedural course of this application.

VIII. Withdrawal of Application

The Commission will grant SBC California's motion to dismiss this proceeding at the request of the applicant. Although SBC California presents no justification for closing the proceeding, the pleadings suggest that intervenors prefer the status quo to the outcomes SBC California has advocated. We

therefore find no compelling reason to pursue the application. We close the proceeding with several conditions.

First, for a period of two years from the date of this order, the Commission will reject for filing any application or advice letter by SBC California that requests recategorization of DA services, including any application or advice letter that incorporates with other matters a request for recategorization of DA. SBC California's application imposed considerable burdens on the Commission and several intervenors and SBC California withdrew its application before the Commission could resolve related issues. Our decision to grant the motion with prejudice for a period of two years recognizes that, in fairness to all utilities, Commission staff and intervenors, the Commission must set priorities to address its substantial workload. We have dedicated enough scarce resources to this issue for the time being and we discourage the filing of future applications that may be arbitrarily withdrawn.

Second, the Commission may incorporate the record of this proceeding into any future applications filed by SBC California for recategorization of DA services. SBC California will have the burden to show that the record in this docket is not relevant to requests in any future application concerning DA services. This condition recognizes the substantial burden on parties and the Commission in litigating SBC California's application and seeks to make efficient use of the existing record in a future application, should one be filed.

Third, we invite Greenlining and TURN to seek compensation for their work in this proceeding pursuant to our intervenor compensation program. Although intervenor compensation is normally granted for work contributing to a final decision on the merits of an applicant's request, there will be no such order in this proceeding. We acknowledge the good faith efforts of the parties to

pursue their constituents' interests in this proceeding and do not believe they should be penalized because we have decided to grant the applicant's request to withdraw the application. At SBC California's urging, we have kept this proceeding open and withdrew from the Commission's August 21, 2003 meeting agenda the ALJ's recommendation to close the proceeding.

We do not order SBC California to reimburse ORA, whose budget is established by the State Legislature with funds collected from customer bills.

In conclusion, we have no reason to believe closing this proceeding will compromise SBC California's customers or the general public and grant SBC California's motion on that basis. Our decision to condition the closure of this proceeding follows from our duty to promote fair and efficient procedures.

IX. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____.

X. Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Kim Malcolm is the assigned ALJ in this proceeding.

Findings of Fact

1. SBC California violated a ruling of the ALJ and the Assigned Commissioner when it failed to take steps to timely notify its customers of PPHs scheduled by the Commission.
2. SBC California acted improperly when it refused to submit to discovery requests in this proceeding.

3. SBC California's actions demonstrate a lack of respect for the Commission, the Assigned Commissioner and the assigned ALJ.

4. SBC California's counsel stated at a PHC that SBC California had no objection to PPHs for this application.

5. The Commission and several parties have expended substantial time and resources processing this application.

6. SBC California presents no justification for closing this proceeding in its filed motion.

7. The Commission has pursued this proceeding at SBC California's urging and contrary to the assigned ALJ's formal recommendation.

8. The Assigned Commissioner's decision to conduct PPHs in this case was responsible and reasonable in light of the public interest in this matter and the facts underlying the application.

9. TURN and Greenlining pursued their constituents' interests in this application in good faith believing SBC California would continue to pursue its application.

Conclusions of Law

1. Only the Commission may close a contested proceeding.

2. Until the Commission, the assigned Commissioner or the ALJ determines otherwise, the procedural status of a proceeding does not change when a party files a motion for Commission action. A party may not assume its procedural requests are granted until and unless it has received a ruling or order of the Commission.

3. The Commission is within its discretion to reject for good cause the filing of any application.

4. Pursuant to §§ 2107 and 2108, the Commission would be within its discretion to fine SBC California for its failure to pursue the ALJ's directive to notify SBC California's customers of PPHs.

5. SBC California violated Rule 1 of the Commission's Rules of Practice and Procedure.

O R D E R

IT IS ORDERED that:

1. Pacific Bell Telephone Company (SBC California) shall not seek recategorization of its directory assistance services for two years from the date of this order.

2. Greenlining Institute and The Utility Reform Network are authorized to seek intervenor compensation from SBC California's shareholders for their activities in this proceeding.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.